United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4145

To be argued by
KRISTIN BOOTH GLEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4145

WNCN LISTENERS' GUILD,
Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

STARR WQIV, INC.,
Intervenor.

ON A PETITION FOR REVIEW FROM A DETERMINATION OF
FEDERAL COMMUNICATIONS COMMISSION

PETITIONER'S BRIEF

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Respondents.	)	
	)	
STARR WQIV, INC.,	)	
	)	
Intervenor.	)	

PETITIONER'S BRIEF

QUESTIONS PRESENTED

1. Whether retention of WNCN's unique classical music format was a "controversial issue of public importance" under the "Fairness Doctrine" where

(a) it was the subject of enormous press and general media coverage; and

(b) it attracted the attention and support of 26 Congresspersons, the New York City Council, the New Jersey legislature, the Governor of New Jersey and numerous other local political figures; and

(c) more than 100,000 citizens of WNCN's tri-state listening area petitioned the Federal Communications Commission for retention of the format at 104.3 mhz on the FM dial?

2. Whether Starr Broadcasting's numerous editorial announcements in its "Save WNCN" campaign, claiming that the unique WNCN format could only be preserved by a pledge campaign aimed at transferring the format to another, non-commercial frequency constituted one side of the public controversy over whether the classical music format should be retained at the same frequency?

3. Whether the Commission abdicated its responsibility under the Fairness Doctrine in totally delegating to Starr the determination of whether it had presented one side of a controversial issue of public importance?

4. Whether Starr's claim that it did not broadcast one side of the format issue can be sustained as "reasonable" where, inter alia,

(a) Starr itself logged the numerous "Save WNCN" announcements as editorials, and

(b) Starr submitted an incomplete representation of material heard by its listeners to the Commission?

5. Whether, in accordance with its own precedent, the Commission must exercise a "stricter standard" in determining "reasonableness" where the licensee has a direct personal financial involvement in the controversy in question?

6. Whether, pursuant to the Fairness Doctrine, Starr had an affirmative obligation to cover all "partisan" sides of the format controversy and to inform its listeners of the underlying facts thereof?

7. Whether, in the case of a format controversy involving the listeners of a particular station, the licensee has a special First Amendment obligation to inform listeners of the facts underlying that controversy and of their First Amendment right to petition the government -- through the FCC -- with regard to that controversy?

Starr was not

STATEMENT OF THE CASE

This is a petition for review, pursuant to 47 U.S.C. §402(a), of a decision of the Federal Communications Commission (hereinafter "FCC") in WNCN Listeners' Guild, FCC.75-539, released May 16, 1975, denying petitioner's fairness doctrine complaint against Starr-WNCN, Inc.,[1/] licensee of Station WNCN-FM, New York. The Commission decision is reported at 53 FCC.2d 149 (1975) and is reprinted in the Appendix hereto at A405.[2/]

That decision, with two Commissioners concurring in the result (Wiley, Chairman, and Robinson) and one Commissioner dissenting (Hooks), affirmed a prior decision of the Commission's Broadcast Bureau (the "staff decision"), entered October 3, 1974 and reported at 49 FCC.2d 36 (1974)(A112).

A timely Petition for Review was filed by the WNCN Listeners Guild (hereinafter "the Guild") on July 15, 1975. A Motion to Transfer to the District of Columbia Circuit was

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1/ Because of the change of format and accompanying change of call letters, the name of the then respondents (now intervenors) changed to Starr-WQIV, Inc., which is how it appears in the present action. The Intervenor will hereinafter be referred to as "Starr."

2/ All Appendix citations will consist of the appropriate page number preceded by the letter "A."

made and denied by this Court on September 23, 1975. A motion for extension of time for the filing of this brief from November 17, 1975 to December 15, 1975 was granted on November 12, 1975.

STATEMENT OF FACTS

The Fairness Doctrine complaint at issue in this case arose from a more extensive and complex legal dispute concerning Starr's decision to change the format of WNCN from 24-hour classical music to "progressive rock," and the efforts of the Guild and another listeners' group[3/] to prevent that change. In order to understand the context in which the fairness complaint arose, and the significance of various facts to that complaint, it is necessary to have a general picture of what occurred in the larger dispute.

BACKGROUND

For seventeen years WNCN-FM, broadcasting at 104.3 megahertz on the FM dial, aired a unique 24-hour classical music format. First owned by the Concert Network and purchased in 1964 by L.W. Froelich, it was sold in 1973 to Starr Broadcasting Corp. after Mr. Froelich's death.

3/ Classical Radio for Connecticut ("CRC"), like the Guild a not-for-profit, tax exempt listeners' group, made up primarily of listeners residing in Connecticut. Although it was a party to virtually all of the other actions involving the WNCN format change, CRC was not involved in the fairness dispute.

On August 27, 1974, William F. Buckley, Jr., Chairman of the Board of Starr Broadcasting, announced Starr's intention of changing WNCN's format from classical music to "progressive rock" on October 4, 1974 (New York Times, Aug. 28, 1974, A365).

Almost immediately thereafter, Mr. Buckley began broadcasting messages over the station urging listeners to join his "Save WNCN" campaign by pledging money so that the WNCN format might be transferred to another, noncommercial frequency on the FM dial (New York Sunday News, Sept. 1, 1974, A15, New York Times, Sept. 6, 1974, A377). These messages, and similar ones recorded or broadcast live by other Starr employees, form the basis for the fairness doctrine complaint and will be discuassed more fully, infra.

A "Committee" was subsequently named by Mr. Buckley to advise on the plan; its chairman was Richard Clurman (A72), (hereinafter the "Clurman Committee"). Tapes made by Mr. Clurman were also frequently broadcast, keeping listeners up to date on the Committee's activities.

Believing that Starr's plan was at best impractical, and at worst a smokescreen to divert legitimate protest, two listener groups, the Guild and CRC were formed to protest the format change. On September 23, 1974 the Guild petitioned the FCC to revoke Starr's license and/or call for an immediate license renewal (the "Petition") (New York Post, Sept. 25, A99). This Petition also contained the Guild's first formal fairness complaint to the Commission. (A10-13).

The Guild also requested the Commission to issue a stay in the format change, and when this was denied it made a similar motion in the United States Court of Appeals for the District of Columbia Circuit. On October 4 that court granted a stay which was subsequently dissolved on October 25, 1974 because the court deemed the Guild's claims not yet procedurally ripe for its determination. The order dissolving the stay, however, enjoined Starr from disposing of the WNCN record library or transferring the format to another station pending the completion of administrative and judicial review. D. C. Circuit No. 75-1925, Order dated October 25, 1974.[4/]

The format actually changed on November 7, 1974 (Newsday, Nov. 8, A187). In the interim, the Commission staff denied the Guild's fairness complaint, Starr replied to the Guild's Petition, and the Guild filed its reply. In November, when the format was no longer on the air and the audience dispersed, the Guild requested that the Commission fashion a monetary remedy for the alleged Fairness Doctrine complaint so that it might purchase time and/or space in other media to present its side.

In February, when Starr's license came up for renewal, the Guild filed a Petition to deny incorporating all of its

4/ This order is a part of the "Addendum" to the Commission's Motion to Transfer in this case, at p. 73 thereof.

previous charges,[5] Starr opposed and the Guild replied. CRC filed a Petition to Deny in April 1975, and on May 1 Concert Radio, Inc., a Chicago based group, filed a competing application for WNCN (WQIV)'s license.

During all this time, no other New York station came forward to accept the WNCN format.

In May the Commission denied the Guild's application for review of the staff fairness decision.

Subsequently Starr announced its intention of selling WNCN (WQIV) to the GAF Corporation, who proposed to return the classical music format to 104.3 on the dial.

Following several months of negotiations, Starr, GAF, the Guild, CRC and Concert Radio entered into a five-party agreement in which the latter three groups agreed to withdraw their various petitions upon Commission approval of the sale to GAF, and certain other conditions which would further guarantee the permanent return of the format.[6] This agreement to withdraw specifically excluded the fairness doctrine complaint on review in this Court.[7]

5/ These included Starr's failure to comply with its representation to the Commission upon its purchase of WNCN, its violation of Commission rules and regulations including the public file requirement and the fairness doctrine, the allegedly fraudulent Starr pledge campaign, and the primary format issue -- that retention of the unique classical music format was in the public interest and must be protected by the Commission.

6/ A copy of this Agreement was attached as an exhibit to the Guild Opposition to Commission Motion to Transfer and is part of the file in this Court.

7/ See Guild Opposition to Commission Motion to Transfer and "Informational Pleading" attached thereto.

On August 25 the format changed back to classical music (with the playing of the Resurrexit from the Bach B Minor Mass) and in October GAF filed its transfer application and the five-party agreement.

Both these documents are presently sub judice at the Commission.

THE FAIRNESS CONTROVERSY

Starr's Actions

Almost immediately following its announcement of the impending format change, Starr begain airing, on a virtually hourly basis, tapes made by its Chairman of the Board.

These tapes proposed a "plan" whereby the WNCN format could be saved; the plan involved raising half a million dollars in listener pledges and transferring WNCN's format, music library and staff to a noncommercial station operating on another frequency. 8/

8/ The first tape went as follows:

> This is William F. Buckley, Jr. I am the Chairman of the Board of Starr Broadcasting Group. You will have heard that Station WNCN will no longer broadcast in the format to which we are accustomed, beginning on October 5th.
>
> Between now and then we hope to conclude arrangements that would permit the continuation of the WNCN format, together with its musical director and its announcers, on another channel. That channel would not carry commercial announcements of any sort. We are, at this point, discussing with several New York channels the possibility of turning over our extraordinary collection of records, which we value second only to the unique staff that has made WNCN possible.

(footnote continued on next page)

Subsequent tapes made by Elise Topaz, a Starr employee, 9/

(footnote continued)

> What we need from you is an expression of interest, concretely. Would you be willing to make an annual contribution to a non-commercial station that would perform for you what WNCN is now performing. Conceivably, we could even arrange to transfer the call letters, to which we are all accustomed, on over to the new channel.
>
> The officers of Starr and representatives of other stations will begin their meetings on Thursday, September the fifth. If we can have from you an expression of your support by then, that would help.
>
> Write to "SAVE WNCN"' mention the amount of money you would be willing to donate if and when the arrangements go through...yes, it would be tax deductible. And send your letter to: WNCN, 2 West 45th Street, New York, New York.
>
> Thank you.

As the Guild later pointed out, Mr. Buckley was clearly wrong as to the tax deductibility issue. At the time the tape was made, and to this very day, no 501(c)(3) organization was formed to accept the requested contributions.

9/ For example, the first Topaz tape, broadcast Aug. 29, stated:

> This is Elise Topaz, a member of the staff of WNCN. We are very sad about the impending format change. Beginning October 5, 1975, WNCN will no longer offer the music to which we have become accustomed. Without the 24 hour-a-day broadcast, it is obvious that the musical life of New York City will suffer a serious loss. William F. Buckley, Jr., Chairman of the Board of Starr Broadcasting Group, and indeed an appreciative listener of the station, has broadcast a taped statement several times over the last few days, which gives us hope that WNCN's survival is still possible. In his statement, he mentions a new station. This new station would be non-commercial, and in order for this possibility to exist, we must have an expression of gigantic support from you -- our audience. We urge you to write to "SAVE WNCN," 2 West 45th Street, N.Y., 10036 and pledge what you would be willing to donate on an annual basis. Please send your letters as soon as possible. We beseech your support. That's "SAVE WNCN," ....

This tape was submitted by Starr (A65) and appended to the Commission's decision (A416).

and David Dubal,[10] WNCN's program director, similarly urged listeners to pledge funds so that the format might survive on a new, noncommercial station.

Toward the middle of the campaign, a mysterious[11] foundation named Merlin appeared, allegedly offering to match listener pledges up to $100,000. This additional boost to the Buckley campaign was duly hyped by Starr[12] and its employees.[13]

10/ One such tape went

> This is David Dubal, Program Director of WNCN. The campaign launched to save our unique classical format is going extremely well. However, we need pledges from one and all. Our many fine volunteers are standing by waiting for your pledge. We need to go over the top soon; speed is of the essence. This must be our big weekend. The number to call is 242-2200, 242-2200. Thank you.

This tape was submitted by Starr (A68) but was not appended to the Commission's decision.

11/ At the time of its purported "offer," there apparently was no legal entity called the Merlin Foundation! See Meltsner, The Fight to Save Mozart (MORE) Vol. V, No. 4, Apr. 1975 (A336, A340).

12/ E.g., this September 8 tape, submitted by Starr (A67) but not appended to the Commission's decision:

> This is William F. Buckley, Jr., Chairman of the Board of Starr Broadcasting. Your initial response to the drive to save station WNCN has made us all hugely optimistic that New York's finest fine music station will continue to serve the community. The good news right now is that a foundation has offered to match up to $100,000.00 any pledge received from today until the end of the drive. With this grant and another $100,000.00 from you will have made it. We promise to keep you posted. Meanwhile, please send in your pledge. Tell how much you would be willing to give annually -- yes, it will be tax deductible -- to keep WNCN alive. Send your pledge to "SAVE WNCN," 2 West 45th Street, N.Y. 10036. Thank you.

Another Buckley tape, submitted by Starr and also dated Sept. 8, contains a similar message (A66).

13/ A Dubal tape of September 7, submitted by the Guild, stated, in pertinent part:

(footnote continued on next page)

Throughout this entire period Starr announcers were encouraged to promote the "Save WNCN" campaign and did so with strong emotion on a frequent basis.[14/] As one announcer stated:

> As of October 5th you will no longer hear classical music broadcast on WNCN. If this shocks you, it is certainly meant to. There is only one way that we can possibly keep classical music coming to you, and I know that you will enjoy hearing it continue, and that is if you pledge to this station. What we're doing is setting up an independent classical music station, with the same staff now operating WNCN, with the same classical music, with one exception: there will be no interruptions like this, we hope, and there will certainly be no commercials. It will be a non-commercial station, which will enable us to bring very, very long selections to you uninterrupted, and I'm sure you will enjoy hearing that, but you must please help us, and we desperately need help....
>
> (A417) (emphasis added)

(footnote continued)

> For every dollar we collect, up to $100,000, over this weekend, starting yesterday, the foundation has offered to match, dollar for dollar, up to 100,000 and we've got 60,000 of it already. You can add to it. Your pledge is worth double, in effect, over this weekend. Not a bad deal.

Exhibit K9 to Guild Petition of Sept. 23, 1975. Through inadvertence, the tapes submitted by the Guild in its petition were omitted from the Appendix and will be submitted in a supplemental Appendix to be filed shortly.

14/ From September 8 through September 13 a Guild volunteer taped and transcribed some of these announcements made by unknown announcers. Transcriptions were submitted with the Guild Petition.

At the conclusion of the successful "Save WNCN" campaign[15/] the audience was thanked for reaching the $500,000[16/] goal set by Starr, and assured[17/] that with the formation of an "Advisory Committee" named by Buckley,[18/] good news would shortly be forthcoming.

Unfortunately, at least as a result of the "Save WNCN" campaign, it never did.

15/ One announcer stated:

> ... the time has come, and the event is SAVE WNCN.

and went on to solicit pledges so that WNCN can "find another frequency" and "continue to broadcast classical music...." Exhibit K15 to Guild Petition.

16/ See, e.g., tape of David Dubal (A417).

17/ At one point Buckley unequivocally stated that "going over the top" would result [in] a continuation of the music in the unique blend you've become accustomed to, with this difference: The new WNCN would not carry commercial advertising" (A415).

18/ The audience was informed of the naming of this committee through a tape made by Elise Topaz (A416) broadcast September 17.

The Guild's Fairness Complaint

The Guild was organized on September 10 and on that date a Guild spokesman telegrammed the President of Starr Broadcasting requesting time to reply to the editorials broadcast by Mr. Buckley, Ms. Topaz and others (A4).

On September 12, when no reply had been received, the Guild's counsel wrote to the station again, requesting time to present an opposing view to Starr's editorials.[19/]

19/ This letter stated, in part:

> Over the past two weeks, on a virtually hourly basis, Mr. William Buckley and various members of WNCN's staff, have been presenting taped editorial announcements with regard to the future of Station WNCN. Obviously, this issue is of the utmost importance to the station's listeners and to the public of this city as well. These announcements present only one side of the issue, i.e., that the classical music format is not economically viable for a commercial station and that the only way to retain the unique programming which WNCN has previously employed is through the means of a listener-sponsored station. No consideration whatsoever has been given to other alternatives, some of which, of course, might seem in the short term to be detrimental to the ownership of the station, but certainly to the public's good.
>
> There has been no indication that WNCN has afforded or plans to afford an opportunity for presentation of contrasting views by any persons. The WNCN Listeners Guild is composed of many members of WNCN's listening public who take a strong interest in the future of classical music on the present broadcast band. This organization is ready and willing to provide a responsible spokesperson for views which contrast rather substantially with the editorial position the station has heretofore taken (A5). (Emphasis added.)

A subsequent letter was sent to the Commission (A106), numerous phone calls were made to the station and to Starr's lawyers (Glen affidavit, A22-23), and, on September 18, the station informed the Guild

> [W]e have decided that your request for time does not come under the "fairness doctrine." (A95)

In its Petition filed September 23, the Guild formally charged Starr with violation of the fairness doctrine for its refusal to permit the airing of views on other ways in which the format might be saved.

It alleged that Starr's "Save WNCN" campaign had been motivated by -- and had resulted in -- personal profit to the company and its stockholders[20/] and had deprived listeners

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20/ The Guild stated:

> By diverting WNCN's audience into a pledge campaign and away from the F.C.C., Starr and its stockholders, such as Buckley, were immediately saved legal costs and profited by an unusually large upswing in their equity.
>
> Starr's stock, which had fallen 17.5% to an all year low in the week before Buckley's announcement on the format change, Broadcasting, Sept. 2, 1974, supra, Exh.C5, was one of the few electronic media stocks to rise when it gained 12.2% in the next week, Broadcasting, Sept. 9, 1974, annexed here as Exhibit C12.
>
> Such a turn-around would not have been possible if petitions such as the instant one had already been submitted to the Commission.
>
> If, of course, petitioners had been completely misled by the editorials of Starr's agents into believing there was no alternative to the station transfer proposal, then the realized pecuniary benefits to Starr and its owners would have been even greater.
>
> Directly and indirectly the editorials broadcast on WNCN improved the financial standing of Starr and its stockholders (A12).

of access to information regarding their rights under the Communications Act (A10, 13).

The Guild also charged that the entire "Save WNCN" plan was "dubious,"[21] "ineffectual," and designed to mislead and divert listeners from legitimate protest (A8-9), charges which it repeated and expanded upon during the course of the litigation.[22]

On September 27 Starr responded to this complaint (A60, et seq.),[23] claiming that the editorial announcements

21/ From the beginning the Guild, echoing the sentiment of many commentators who saw the "Save WNCN" campaign as a "smokescreen," pointed out that there simply were no unassigned frequencies available in the New York market, and that the stations "proposed" by Starr (to the press only, never on the air) had their own format commitments which would make it impossible to take on the WNCN staff and format, "lock, stock and barrel."

22/ As the Guild later argued, Buckley and Starr knew early on that their initial plan had no chance of working as proposed, but they deliberately failed to communicate this information to the still-hopeful listeners. Guild Reply, April 10, Appendix at A325, et seq. and exhibits thereto.

23/ It was in this pleading that Starr submitted the nine transcriptions which it stated were the "continuity" on the issue. The Appendix to the Commission's opinion, apparently reproducing all the tapes in question, in fact reprints only six of these transcriptions.

broadcast on behalf of its "Save WNCN" campaign

> simply took note of WNCN's change of format....

and that the

> ... merits of WNCN's change of format was (sic) not even mentioned, let alone argued, during the broadcasts (A61). (emphasis added)

After a Guild Reply to this Opposition, filed September 30, 1975 (A73, et seq.)[24/] the Broadcast Bureau of the Commission, acting pursuant to delegated authority, rendered a decision denying the Guild's complaint.

The Staff Decision

In its October 3 decision (A112, et seq.) the staff stated that:

> Assuming arguendo that the issue of WNCN-FM's format change is a controversial issue of public importance in the New York City area ...

24/ This Reply pointed out, inter alia, the procedural defects of Starr's opposition (it was an unverified letter signed by Peter Starr on the letterhead of his Washington counsel (A75)), the nature of the controversial issue of public importance (A77-78), the fact that the licensee was editorializing in a matter in which he was personally and financially involved, thus requiring a "stricter standard" of review under Commission precedent (A78-79), Starr's failure to submit transcriptions of material supporting the Guild's petition, while implying that it had supplied "all continuity" on the "Save WNCN" campaign (A83-84) and the fact that the announcements in question were actually logged as "editorials" by the station (A85).

Starr was not

> unreasonable in determining that the announcements in question did not present one side of a controversial issue because the announcements "simply took note of WNCN's change of format" and did not argue the merits of the change. (A 114)

The staff did not mention the argument that Starr's submission of incomplete and misleading material went directly to the question of its "reasonableness" and "good faith," nor did it apply the requisite "stricter standard" because of the licensee's financial involvement in the controversy, nor did it address the fact that the announcements had been actually logged as "editorials."

The staff also entirely ignored the Guild's contention (A72) that Starr violated the Fairness Doctrine's affirmative obligation to cover the format controversy and all its "partisan" sides in the first instance.

The Commission Decision

Following a Guild Application for Commission Review (A144, et seq.), a Starr Opposition thereto (A227, et seq.) and a Guild Reply (A277, et seq.), as well as some other procedural but informative pleadings,[25/] the Commission rendered its decision on May 16, 1975 (A405, et seq.).

25/ Primary among these was the Guild's Opposition for Motion of Extension of Time, filed Nov. 22, 1974 A170, et seq.

The Commission decision, discussed more fully, infra at Points II and III, affirmed the rationale of its staff decision, adding that the Guild was incorrect in arguing that a stricter standard applied in the case of self-interested licensee editorializing, that the logging of the announcements as "editorial" was irrelevant, and that the staff had considered[26/] all transcriptions submitted to it.

Thereupon the instant appeal ensued.

26/ This, of course, entirely missed the Guild's issue of evidence showing the licensee's "bad faith," see pp. 51-53, infra.

direct impact on a substantial portion of the community, nor

SUMMARY OF ARGUMENT

Under the FCC's Fairness Doctrine, a broadcaster must provide reasonable opportunities for the presentation of contrasting viewpoints on controversial issues of public importance. That Doctrine is based on the public's paramount First Amendment right to receive diverse viewpoints and information.[27/]

This case ultimately involves the question of whether the FCC properly administered the Fairness Doctrine when it deferred to and accepted as reasonable, Starr's determination that its "Save WNCN" pledge campaign announcements did not constitute one viewpoint on the change of format controversy.

Starr's announced abandonment of its unique 24-hour classical music format formed an immediate and electric controversial issue of public importance. Point I(A), infra. Starr's "Save WNCN" campaign, suggesting in almost hourly announcements that the only way to preserve the format was by pledging money to transfer the WNCN format to a noncommercial frequency, constituted one side of that issue, Point I(B), infra, in direct opposition to the view of the Guild that, as a result of legal precedent, the format could and should be retained at the same frequency.

27/ A brief history of the Fairness Doctrine and its sources is contained in the "Introduction," infra.

In reviewing the Guild's format complaint, the Commission totally and illogically accepted Starr's determination of the facts and its characterization of both the "issue" and its announcements (Point II(A), infra). Accepting this determination and characterization without any independent consideration of the Guild's claims or the facts of this case, the Commission held Starr's determination that its announcements did not constitute one side of a controversial issue of public importance to be "reasonable."

The decision that Starr had not broadcast one side of the controversy was arbitrary, capricious, and unsupported by substantial evidence. The blind finding that it was "reasonable" constituted an impermissible delegation of the Commission's statutory and constitutional responsibility under the Fairness Doctrine (Point II(B), infra).

In determining that Starr had acted "reasonably" the Commission totally ignored the fact that Starr was personally and financially interested in the controversy. Under prior Commission precedent and general Fairness Doctrine considerations, this fact should clearly have required the imposition of a stricter standard of licensee responsibility and reasonableness (Point II(C), infra).

In making the decision the Commission also ignored a number of facts which went directly to the "reasonableness" of the licensee's determination, including the fact that the

announcements in question were actually logged as "editorials," and that in attempting to sustain its position, the licensee submitted an incomplete record of what its listening audience actually heard. This and other evidence that the Commission did not, in fact, engage in "reasoned decision-making" warrants particular scrutiny by this Court in support of its supervisory power over the agency (Point III).

Finally, this case presents special First Amendment considerations where this Court's expertise is surely as great as that of the Commission (Point IV).

The first requirement of the Fairness Doctrine -- that of coverage of controversial issues and the facts underlying them -- is premised on the First Amendment and requires that the right of the listeners to know take precedence over the broadcaster's absolute discretion as to what he will air.

On the facts of this case, and particularly because the controversial issue directly affected precisely the listeners of its station, Starr should have been affirmatively required to air all sides of the format controversy (Point IV(A)). This general First Amendment and Fairness requirement is doubled by the fact that a format controversy such as this involves another First Amendment right, that of the people to petition their government for redress of their / grievances (Point IV(B)).

As the Commission has refused to require an affirmative obligation of the licensee, this Court, consistent with the First Amendment, must do so.

INTRODUCTION : THE FAIRNESS DOCTRINE

In accordance with its obligations to regulate the public airwaves in the "public interest convenience and necessity," 47 U.S.C.§§303, 307(a), 309(a), the Federal Communications Commission has long required broadcasters to present programming elucidating "controversial issues of public importance".[28/]

The requirement, which came to be known as the "Fairness Doctrine"[29/] developed gradually in a long series of Commission cases, and was first fully set forth in the Report in the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246 (1949) (hereinafter "1949 Report") and was elaborated upon in Applicability of the Fairness Doctrine in Handling Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) (hereinafter the "Fairness Doctrine Primer" or "Primer").

28/ This principle was first enunciated by the Federal Radio Commission, predecessor of the FCC, in 1929, Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929) rev'd on other grounds 37 Fed. 993 (D.C. Cir.) cert. den. 281 U.S. 706 (1930); for a complete summary of the development of the Fairness Doctrine, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-386 (1969).

29/ The Fairness Doctrine is not to be confused with the so-called "equal time rule" for political broadcasts, 47 U.S.C. 315, nor with the "personal attack" rule which is one component of the Fairness Doctrine, see Red Lion, supra, but which is not at issue here.

In 1959 Congress amended §315 of the Federal Communications Act to give statutory approval to the Fairness Doctrine, Act of September 14, 1959 §1, 73 Stat. 557, 47 U.S.C. §315(a).[30/]

The Doctrine imposes two affirmative responsibilities on broadcasters:

1) coverage of issues of public importance must be adequate; and

2) the coverage must fairly reflect differing viewpoints on the issue, Red Lion, supra at 377.

The first of these requirements imposes an affirmative obligation on the broadcaster to devote time to controversial issues without regard to the personal views of the broadcaster, the possible unpopularity of the subject or the view to be expressed. 1949 Report at 1249-50.

30/ The Supreme Court, in Red Lion, supra, described this as follows:

> In 1959 the Congress amended the statutory requirement of §315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, §1, 73 Stat. 557, amending 47 U.S.C. §315(a) (emphasis added.) This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard. Red Lion, supra at 380.

This requirement is imposed to prevent the broadcaster from

> excluding partisan voices and always itself presenting views in a bland, inoffensive manner.
>
> Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 131 (1973) (hereinafter "CBS")

The first requirement is also imposed to insure that the listening public will have all the facts underlying a particular controversy so that it may make an informed judgment about which, if any, side it chooses to support. 1949 Report, 13 FCC at 1254-55.[31/]

The second requirement in turn requires the broadcaster to actually seek out spokespersons for the opposing side of an issue it has covered, even if none presents himself, see, e.g. John J. Dempsey, 40 FCC 445 (1950), and even to provide free time for the presentation of opposing views if a paid sponsor is unavailable. See Cullman Broadcasting Co., 40 FCC 576 (1963).

In 1969 the Supreme Court considered a challenge to the constitutionality of the Fairness Doctrine brought by broadcasters

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31/ See fn. 87, infra, for the relevant language. As the Court in Red Lion wrote,

> [I]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas which is crucial here. Red Lion, supra at 390.

who claimed that it violated their First Amendment rights. Far from agreeing, the Court upheld the Doctrine, holding vigorously that

> It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount.
>
> Red Lion, supra at 390[32/]

In CBS v. DNC, supra, the Supreme Court considered whether the First Amendment required a so-called "right of access" in reviewing the FCC's refusal to require broadcasters to sell advertising presenting opinions on controversial subjects. In denying a right of paid access,[33/] the Court strongly

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32/ As Professor Jaffe has written,

> The court held that the fairness doctrine and even a right to command time, is not only tolerated by the First Amendment, but is required by it.
>
> The fairness doctrine promoted "the purposes of the First Amendment to preserve an uninhibited market place of ideas - that right [of viewers and listeners] may not constitutionally be abridged either by Congress or by the FCC." (Citing Red Lion at 390.)

L. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L.Rev. 768. 774 (1972) (hereinafter "Jaffe").

33/ The issue presented in CBS was whether "responsible groups have a constitutional right under the First Amendment to purchase time for the presentation of advertisements and programs in order to air their views about controversial issues of public importance." The Supreme Court split seven to two in holding that there is no such constitutional right. The large majority was not unanimous, however, on the grounds for the decision, with six Justices holding on various grounds that the First Amendment would not require the sale of time even if state action were involved, three Justices finding that state action was not involved, and two Justices dissenting. For a discussion of these various holdings, see Comment: The Regulation of Competing, First Amendment Rights: A New Fairness Doctrine Balance After CBS? 122 U.Pa. L.Rev. 1283, 1289-93 (1974).

reaffirmed the Fairness Doctrine, finding it sufficient to serve the First Amendment rights of listeners and viewers.

With these statutory and constitutional mandates clearly before it, the Commission undertook another inquiry into the effectiveness of the Fairness Doctrine[34/] which resulted in its report, The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Fairness Report, 48 FCC.2d 1 (1974) appeal docketed sub. nom. National Citizens Committee for Broadcasting v. FCC (No. 74-1700,D.C. Cir., July 3, 1974)[35/] (hereinafter "1974 Report").

The sources for Commission and for judicial consideration of individual Fairness Doctrine complaints are thus the two Commission "Reports" (1949 and 1974), the Primer (1964), Commission case law, Congress's legislative approval and enactment of the 1949 Report and subsequent cases, and the constitutionally required mandates of the Fairness Doctrine as enunciated in Red Lion and CBS, supra.

It is against this background, and within this precedential framework that Petitioner's claim must be considered.

34/ In CBS the Supreme Court noted that a Notice of Inquiry had already been docketed, 30 F.C.C.2d 26, 36 Fed. Reg. 11825 (1971) and hearings were already underway on such questions as "whether there is any feasible method of providing access for discussion of public i sues outside the requirements of the fairness doctrine" CBS, supra at 131-32.

35/ This appeal is presently being held in abeyance for Commission reconsideration of precisely such issues as "access is fairness," which, however interesting, are not crucial to determination in the instant case.

POINT I

STARR VIOLATED THE FAIRNESS DOCTRINE BY PRESENTING ONLY ONE SIDE OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

A. The Format Change Was A Controversial Issue of Public Importance

The initial question in any Fairness Doctrine dispute is whether the material broadcast by the licensee constituted discussion of a "controversial issue of public importance." The Commission has provided general standards[36/] by which a particular issue may be characterized for Fairness Doctrine purposes and it is these standards which should be applied to Petitioner's claim.

In its 1974 Report, the Commission wrote, as to whether an issue was of "public importance,"

> ... the degree of media coverage is one factor which clearly should be taken into account in determining an issue's importance.[37/] It is

36/ The Commission noted,

> It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. (48 FCC.2d at 11)

but went on to set forth its "generalized observations" discussed infra.

37/ The Commission was careful to point out that a particular story might be "newsworthy" and yet not fall within the "issue of public importance" test, citing Healy v. FCC,

(footnote continued on next page)

> also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large.
>
> 48 FCC.2d at 11-12

The Commission found "controversiality" somewhat easier to define by reference to objective standards. It wrote:

> ...[I]t is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. It is possible, of course, that "programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." Report on Editorializing, 13 FCC at 1251. In such circumstances, it would be appropriate to make provision for opposing views when the opposition becomes manifest.
>
> Id. at 12

(footnote continued)

460 F.2d 917 (D.C.Cir. 1972). In that illustrative case the complainant attacked a news story which challenged whether she could be both a good Communist and also a patriotic American citizen. While the issue was "newsworthy" and obviously of importance to Ms. Healy, the Commission and the Court found that it was hardly one whose resolution affected the community at large, and hence did not come under the Fairness Doctrine.

Finally, following its language in earlier cases,[38] the Commission specifically determined that a controversial issue of public importance could be presented "implicitly" when

> [A] broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue.

Id. at 12

See also, Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) cert. den. sub. nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969).[39]

Under all of these standards, the issue at question in the instant case was clearly one of the utmost public importance[40] as well as one of great controversiality.

38/ See, e.g., Horace P. Rowley, III, 38 FCC.2d 49, 53 (1972).

39/ In both those cases advertisements which favorably portrayed certain products and attitudes were found to implicitly take one side of an unstated but important public issue, i.e., the problem of automotive pollution of the environment and the danger of cigarette smoking to the public health.

40/ It should also be noted that, as a matter of law, the retention of a "unique format" has been raised to the level of the "public interest, convenience and necessity" under a series of court decisions beginning with Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970) and culminating in Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc).

1) Public Importance

The issue of WNCN's change of format[41/] was one involving extensive media coverage, attention from government officials, and great impact on the community at large.

41/ There can be no question that this was the issue to which the Guild wished to address itself, and which it considered the "controversial issue of public importance." The first Guild request, Edwards telegram, September 10 (A4) refers to WNCN's almost hourly editorials

> presenting Starr Broadcasting's position on the public matter of WNCN programming.

The second request, Glen letter, September 12, refers to the issue of the "future of Station WNCN" and stated the one side of that issue presented by Starr

> i.e., that the classical music format is not economically viable for a commercial station and that the only way to retain the unique programming which WNCN has previously employed is through the means of a listener-sponsored station. (Emphasis added) (A5)

The September 18 affidavit of the Guild's counsel referred to "WNCN's format" as the issue requiring Fairness Doctrine application (A22) and a September 19 letter to the Commission states:

> The change of format has become a matter of great concern to WNCN listeners in the tri-state area (A106)

Subsequent pleadings continued in the same vein.

Exhibit C to the Guild's original Petition, e.g. A115 and additional exhibits submitted by the Guild demonstrated the enormous magnitude of press coverage of the proposed format change.[42] They included news/feature articles from MORE, the New York Times, the Daily News, Sunday News, Broadcasting, Variety, the Village Voice, the Long Island Press, Cue, New York Magazine, the New York Post and Newsweek Magazine[43] The Times alone carried more than nine articles involving the format change from Starr's announcement in late August to the end of September, and editorialized on the issue on September 28.[44]

The "attention from government officials" was similarly impressive. The New Jersey Legislature passed a unanimous resolution calling for retention of the format and full public hearings on the matter (A171); this was followed by a similar resolution issued by the New York City Council (A188). Two dozen Congress people whose districts had been served by WNCN

42/ It should be noted that in fulfilling his Fairness Doctrine obligations a licensee clearly may not rely on material broadcast over other stations to absolve him from covering both sides of an issue, e.g., Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971) and he certainly may not rely on the non-broadcasting press.

43/ See, e.g., Appendix at pp. A94-104.

44/ See Appendix (A97). Four more Times editorials were to appear before the issue of WNCN's format was ultimately resolved. See, e.g., the New York Times, November 9 (A184).

appealed to the FCC for action on the format change (A172) as did Governor Byrne of New Jersey (A172) and numerous other local political figures. It is hard to recall any issue in recent times where the strength of feeling has so transcended all political and ideological divisions.

Finally, the "impact on the community at large" can best be measured by the enormous outpouring of public support for the retention of the classical format.

The response to Starr's own "campaign" is illustrative. In less than two weeks, including the Labor Day weekend and Jewish holidays, over 20,000 people responded to the "Save WNCN" campaign and pledged more than $500,000 (A77).

At the time the Guild filed its initial Petition at the Commission, the latter had received more than 800 letters of protest and the Guild more than 1200 (A78). More to the point, at that early date[45/] 2000 persons had signed petitions; by the end of the struggle to Save WNCN more than 100,000 citizens had petitioned the FCC for the return of the classical format. It is hard to imagine another issue which has had more

45/ This was at a time when the Guild had no public exposure whatsoever, and prior to an advertisement which it purchased in the New York Times of September 27 in hopes of reaching some of WNCN's listeners with its side of the controversy.

financially interested in the ultimate issue of WNCN's format

direct impact on a substantial portion of the community, nor one which has called forth a more passionate response.[46/]

2) Controversiality

The same factors set forth to show that the format change was an issue of public importance, pp.30-32, supra, similarly demonstrate thatit was "controversial" within the Commission's definition.

Further, even if one believes[47/] Starr's claim that it never discussed the"merits" of WNCN's format change (A61) but merely discussed a possible way to continue classical music broadcasting on another station, it is clear that once controversy arose around this "plan," as it most assuredly did,[48/] that very

46/ The almost universal joy which greeted the return of the format on August 25 similarly demonstrates the scope and breadth of public concern about the issue. See, e.g., the New Yorker, September 8, 1975, p. 25; New York Magazine September 22, 1975, p.60; the New York Times, August 26, pp. 1 and 7; the New York Post, August 26, 1975, pp. 2 and 48; and the New York Times editorial, August 23, p. 20.

47/ This, of course, is directly belied by consideration of the tapes themselves, see pp. 8-12, supra. See particularly p. 11 where a Starr spokesperson speaks of the "only way" to save the classical format.

48/ See allegations that the "plan" was merely a "smokescreen" to divert legitimate protest to the FCC in, e.g., the Daily News (A15), MORE (A337-39), Newsweek (A98), the Long Island Press, and New York Magazine. Exhibits C14 and C21 to Guild Petition (Supplemental Appendix).

controversy and opposition of a substantial nature [merited] presentation of opposing views.

1949 Report, supra, 13 FCC at 1251 49/
1974 Report, supra, 48 FCC.2d at 12.

POINT II

THE COMMISSION ERRED IN DELEGATING ITS OWN RESPONSIBILITY UNDER THE FAIRNESS DOCTRINE TO THE LICENSEE AND IN FINDING THAT THE LICENSEE'S DETERMINATION THAT IT HAD NOT PRESENTED "ONE SIDE OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE" WAS "REASONABLE"

Given all which has been said thus far, the conclusion seems obvious that

1) There was an issue of public importance and controversy -- that of WNCN's format change, whether or not it should happen, and how to avoid the loss of the format;

2) That Starr's failure to provide the public with essential facts about the dispute, i.e., that they had a right to petition the Commission and/or to take legal action violated the first affirmative action requirement of the Fairness Doctrine; and

49/ This argument is somewhat different from the affirmative one, Point IV(A), infra, in that its basic thrust is to show that, in determining the key issue on "controversiality" one can look to a time subsequent to that on which the licensee's presentation was made. In the instant case, of course, we argue that the issue was controversial and of public importance from the first date on which the licensee began editorializing on it.

3) That Starr's presentation of one and only one way to save the format constituted one side of the controversy, in violation of the second, "opposing sides" requirement of the Fairness Doctrine.

Surprisingly, and sadly -- for the listeners whose interests it is charged with protecting -- the Commission reached no such conclusion. In an opinion adhered to by four Commissioners[50/] the Commission found no Fairness Doctrine violation on the sole ground that the licensee had made a "reasonable" determination that it had not presented one side of a controversial issue of public importance.[51/]

The Commission's opinion bears close analysis, for it is in this way that its arbitrary and capricious "curious neutrality-in-favor-of-the-Broadcaster"[52/] can best be understood.

50/ Two Commissioners, Chairman Wiley and Robinson, concurred only in the result. As they did not file spearation opinions we have no idea of what grounds they based their affirmance on. Commissioner Hooks dissented but filed no opinion.

51/ This was the holding of the Broadcast Bureau, and as it was affirmed by the Commission, the latter found it "unnecessary to rule on whether the WNCN format change was in fact a controversial issue of public importance." The two issues are, of course, so vitally interrelated that it is entirely artificial to consider them separately, as an analysis of the Commission's decision will demonstrate.

52/ Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969). This characterization by then Circuit Judge Burger was reiterated in a subsequent case, Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970) by Judge Tamm who, in severely criticizing the Commission staff, found that it "may have been somewhat of an understatement," id at 566, fn. 9 (concurring opinion).

The Commission's opinion takes certain general principles of law which it blindly applies without regard to the facts of the case or to the particular First Amendment issues it poses.[53/]

Its reasoning goes like this:

> a) The initial factual determination as to whether there has been a controversial issue of public importance and whether the licensee has presented one side of it must be made by the licensee.
>
> b) Because the Commission must minimize its review of "licensee's editorial judgments" it will only act when the licensee's judgment as to either issue has been "unreasonable" or in "bad faith," and
>
> c) It is irrelevant that the licensee is personally interested in the controversy, and the same standard of review applies regardless of his financial or other involvement.
>
> d) Accepting Starr's version of the facts, Starr made a "reasonable" determination that it was not presenting one side of the format issue.

53/ It should be noted at the outset that because of the primacy of First Amendment issues in this case, this Court, whose knowledge and expertise in constitutional matters is certainly as great as the Commission's, need not defer to what might generally be considered the "expertise" of a regulatory agency. The Supreme Court recognized this in CBS v. DNC, supra, where, in its discussion of the First Amendment aspects of the Fairness Doctrine, it wrote:

> That is not to say we "defer" to ... the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should it be determined that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

CBS v. DNC, supra at 103.

The problem with this approach in this case is twofold. First, the Commission did not even follow its own stated standards, since it did not defer to the licensee's reasonableness and good faith, it just deferred to the licensee completely -- in both the selection of relevant facts and the treatment thereof.

Second, the Commission's standards are erroneous, both in logic and prior precedent, since a licensee cannot be presumed to bring the same objectivity to a matter in which he is personally and financially interested as he can in ordinary Fairness Doctrine cases where he is, foremost, a public trustee and journalist, rather than partisan advocate for himself.

Thus we treat these issues below in terms of the Commission's arbitrary decision-making in (1) its illogical acceptance of Starr's version of the relevant facts; (2) its abdication of responsibility to determine whether Starr's judgment was reasonable, even under the Commission's own standard of "deference to licensee discretion;" and (3) its improper deference to a licensee who himself is a personally involved partisan in the controversy at issue.

A. The Commission Totally Accepted Starr's Distortion of the Facts

The initial decision by the Broadcasting Bureau assumed, arguendo, that the issue of WNCN's change of format was one of "public importance" but found that Starr had been reasonable in determining that it had not aired one side of that issue.

This rather extraordinary conclusion was reiterated by the Commission, despite its recognition that material broadcast by Starr indicated that transfer of the format through the pledge campaign was "the only way" to save the format and that

> ... in this light the "Save WNCN" campaign could be considered to be "obviously and substantially related" to the format change.
>
> Comm. Op. (A413)

In an extraordinary non sequitur, the Commission found that since the essential issue was the format change and the "major arguments advanced by partisans on one side or the other of the public debate were the 'economic viability of the clasical music format' on a commercial radio station" and "possible misrepresentations" made by Starr in its 1972 renewal application,[54/] the "Save WNCN" campaign and/or any

54/ The Commission chose but two of many grounds advanced by the Guild in its petition urging revocation of Starr's license. It ignores another ground -- the claim that the "Save WNCN" campaign was intended to divert listener protest, sufficient, in and of itself, to deprive Starr of its license as a trustee of the public airwaves. If the Commission wishes to see the grounds urged for revocation as the "major arguments" of partisans, it should at least be consistent. But the point is, of course, that it was the ultimate relief requested and not the grounds upon which the relief might be premised which was the real issue.

statements made on its behalf were not

> among the "major arguments" on either side of the format change controversy'"

Com. Op. (A414)

The Commission mistakes the trees for the forest. The issue was always, "Shall the unique WNCN format continue at its accustomed frequency, 104.3 mhz on the FM dial?"[55/]

The "partisan" Guild argues "yes" because cases such as WEFM, supra, required retention of a unique format as part of the public interest, convenience and necessity.

The "partisan" broadcaster and its "Advisory Committee" argued "No" because a broadcaster has a right to air whatever he wants, and if the format is to survive, it must do so somewhere else.

Under either of the standards discussed below, it is impossible to see how Starr's position did not constitute one side of the controversy or how its determination that it was merely "taking note of the format change" without expressing an opinion thereon[56/] can be considered either "reasonable" or in accordance with the most basic principles of the Fairness Doctrine.

55/ This was, of course, also both the temporary and ultimate relief requested by the Guild, as recognized in the D.C. Circuit's initial stay of the format change on 104.3 and its subsequent order, in dissolving the stay, prohibiting Starr from transferring the format to another frequency pending final administrative and judicial review of the Guild's contention. D.C. Cir. #75-1925, Order dated Oct. 25, 1974.

56/ See a further discussion involving the inconsistencies of the Commission's opinion in this matter at pp. 51-53, infra.

B. Even Under A Standard of Deference the Commission May Not Abdicate Its Responsibility to Determine a Licensee's "Reasonableness"

The Commission has stated, and the courts have recognized, that in applying the Fairness Doctrine,

> ... the licensee ... is called upon to make "reasonable judgments in good faith on the facts of each situation" as to whether a controversial issue is involved, and, if so, what programming is required to fairly present that issue.
>
> Fairness Primer, supra, 40 FCC 598, 599
> Neckritz v. FCC, 446 F.2d 501, 502 (9th Cir. 1971)

This initial deference to the broadcaster is made so that

> ... the Commission does not substitute its judgment for that of the licensee, but rather determines whether the licensee has acted reasonably and in good faith.
>
> Id. 57/

This general principle does not, however, permit the Commission to entirely delegate the power to determine whether

57/ It must be noted that the Commission does not institute proceedings like those in the instant case. An actual fairness complaint must first be filed by an interested citizen or responsible group and the Commission's own rules require a great deal of specificity before such a complaint will be considered, Fairness Primer, supra, 40 FCC at 600. The Commission's role is thus not as a general censor but as an adjudicator of asserted statutory and constitutional rights.

violations have occurred to one of the adversaries to the controversy. As the Supreme Court has said:

> We reject the suggestion that the Fairness Doctrine permits broadcasters to preside over a paternalistic 58/ regime. See Red Lion, 395 U.S. at 390.
>
> CBS v. DNC, supra at 130

The Court's hopefully realistic faith 59/ in non "paternalism" was based on the existence of standards reflecting basic premises which it believed the Commission would and must apply. While it recognized that the broadcaster

58/ This charge was made in CBS in the D.C. Circuit where the Circuit Court stated that the Fairness Doctrine, as applied by the Commission,

> conforms ... to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," and how "fully" to cover them, and the format, time and style of the coverage. (450 F.2d at 656).

59/ Unfortunately, the Commission's performance in this area leaves a great deal to be desired. The courts have noted the danger of the "Commission assum[ing] an attitude of indifference or hostility toward public intervenors." Hale v. FCC, 425 F.2d 556, 566 (D.C. Cir. 1970) (Tamm, J., concurring) and the Commission's apparent limitation of broad court decisions to the particular facts of the particular case in question; e.g., Citizen Committee to Save WEFM, supra. Professor Jaffe has charged that the Commission's enforcement is often limited to reflect popular prejudice, Jaffe, supra at 772; and the Commission has frequently been charged with "reflecting the views of the industry it regulates," therefore incapacitating it from effectively enforcing good faith standards on broadcasters. Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L.J. 90, 121-125 (1973). See Friendly, A Look At The Federal Administrative Agencies, 60 Colum. L. Rev. 429, 444-46 (1960), Harv. Civ. Lib.-Civ. Rts. L.Rev., infra at 150-57, U.Pa. L.Rev., supra.

> is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations....
>
> CBS v. DNC, supra, at 111

the Court strongly stated that the broadcaster's discretion

> is bounded by rules designed to assure that the public interest in fairness is furthered.

and went on to say

> The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. 60/
>
> Id. at 111-12 (emphasis added)

Over the years the Commission has developed certain standards which must apply when the Fairness Doctrine is invoked. 61/ These standards, including the factors to be considered in determining what is a "controversial issue of public importance," have been discussed above; see pp. , supra. They are, in the first instance, for the licensee, but if the licensee does not apply or accept them, the Commission must.

60/ Significantly, the Court was quoting the Commission's own language, which it obviously believed the Commission itself would apply.

61/ Commentators have suggested that whatever problems may occur with the Fairness Doctrine are not connected to the vagueness of the Doctrine, but to the Commission's un"even-handed" application of standards relating to it. See, e.g., Comment: Evaluation of the Basis for and Effect of the Fairness Doctrine, 5 Rutgers-Camden L.J. 167, 178 (1973); Note, U. Pa. L.Rev., supra.

For, as the Commission has recently stated,

> Licensee discretion is but a means to a greater end, and not as an end in and of itself, and only insofar as it is exercised in genuine conformity with the paramount right of the listening and viewing public to be informed of the competing viewpoints on public issues can such discretion be considered an adequate means of maintaining and enhancing First Amendment rights....
>
> 1974 Report, 48 FCC.2d at 30 (Emphasis added)

Any impartial examination of the facts on the record in the instant case compels a conclusion that Starr presented one side of a controversial issue. That Starr, for its own reasons,[62/] might choose to see it otherwise is not surprising; that the Commission was unwilling to fulfill its statutory and constitutional mandate and judge the facts in light of the standards it has consistently stated, based solely on lip service to licensee discretion, certainly cannot be countenanced by this Court.

62/ As the Guild suggested in its earliest pleadings, the introduction of the "Save WNCN" plan actually caused Starr's stock to rise. That plan, if accepted, would also have saved great sums in legal fees. See fn. 20, supra.

C. The Commission Applied The Wrong Standard of Deference In This Case In View of the Licensee's Personal Financial Interest In The Controversy

We have argued that under ordinary Commission Fairness Doctrine standards the licensee's determination that it was not presenting one side of a controversial issue cannot be sustained as "reasonable." But beyond this argument is the fact that in this case the Commission departed from an entire line of cases imposing a stricter standard than mere "reasonableness" on licensees whose private interests are directly involved in the controversy in question. The necessity for application of this standard and the Commission's noncompliance with it in and of itself require reversal here.

Consistent with the "most basic consideration" 63/ of the Fairness Doctrine, the Commission has repeatedly held a licensee's Fairness Doctrine obligation

> ...assumes special significance with respect to issues which affect the licensee personally and financially.
>
> WSOC Broadcasting Co., 40 FCC 468, 469 (1958) 64/

63/ See the quote from CBS v. DNC from which this language is taken at p. 42, supra. The Court in that case noted, significantly, that "a licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a public trustee." Id. at 118.

64/ In that case the licensee had broadcast two programs and 43 spot announcements opposing subscription television, but had not presented views of persons favoring STV although the issue was then the subject of Congressional hearings. Even though, one month later, the station offered time to three STV groups, the Commission considered its action not "timely" and found a violation of the Fairness Doctrine.

Subsequently, in Springfield Television Broadcasting Corp., 45 FCC 2083 (1965) the Commission held that

> where a licensee has made a good faith judgment that it should present its viewpoint on a matter in which it is personally involved, [65] the licensee has a particular duty to insure that the requirements of fairness are satisfied.
>
> Id. at 2086 (emphasis added)

The Commission went on to say, with respect to the particular facts of the case,

> Springfield, however, far from making the special efforts to achieve fairness required in this case, has not shown that it made the minimum efforts required in the ordinary case.
>
> Ibid (emphasis added) [66]

Significantly, although it did not impose a sanction in that case, in 1971 Springfield was granted only a short-term license renewal.[67] The Commission held that

---

65/ The licensee's right to editorialize on any matter exists irrespective of whether he has a personal interest in it, Springfield, supra at 2085; once he has done so, however, the special efforts test becomes applicable.

66/ In Springfield, the licensee carried a series of editorials against CATV generally and local CATV interests (which would, of course, create competition) in particular. Although transcripts of the editorials in question were sent to local CATV groups, they did not request time to appear, and no CATV viewpoint was ultimately presented. Notwithstanding the refusal of the individuals in question to appear, the failure to affirmatively provide the other side of the issue was held to violate the Fairness Doctrine.

67/ This is considered a serious sanction, which is but one step below the ultimate sanction of total non-renewal of the licensee.

> licensees who editorialize on matters of personal concern which involve controversial issues of public importance should exercise extraordinary diligence to achieve fairness.
>
> Springfield Television Broadcasting Co. 29 FCC.2d 339, 341 (1971)

The Commission therefore required Springfield to submit with its next renewal application,

> a complete report on procedures instituted to achieve fairness when it editorializes on a controversial issue of public importance with which it is personally involved (e.g., CATV).
>
> Ibid.

The principle of a "higher standard" set forth in WSOC, in Springfield and other Commission cases,[68/] is one which should clearly have applied to Starr's fairness obligations in the instant case. There is no question that Starr was vitally

68/ E.g., Pennsylvania Community Antenna Association, Inc., 6 Pike & Fischer, RR.2d 112 (1965) where the three licensees complained of had aired views inimical to CATV. Only one was held to have met the "particular duty" established by the above line of cases to insure the presentation of contrasting views. This station had attempted to arrange for a discussion program featuring the views of the four major local CATV applicants, had broadcast daily a 15-minute program of direct reading of letters from the public, many against its own position, on the CATV issue (on which it offered to read the position of the Pennsylvania CATV Association), and had broadcast an editorial response by one of the local cable applicants. The other two stations were held to have violated the higher standard of fairness obligations required of "a licensee which presents viewpoints on a matter in which it is personally involved...." Id. at 116.

financially interested in the ultimate issue of WNCN's format[69] as well as the more immediate issue of public acceptance of its own "Save WNCN" plan.[70]

Yet the Commission refused to apply the "stricter standard" offering an explanation which strains credulity, does violence to its former holdings,[71] and undermines the "most basic consideration" of the Fairness Doctrine.

It distinguished Springfield and the other cited cases on the ground that the stricter standard only applies to "special efforts" which must be made by the licensee after he has determined he is presenting one side of a controversial issue of public importance. Although the Commission agreed

69/ Its whole rationale for changing the format was its enormous alleged financial losses; its opposition to the stay of the format change issued by the D.C. Circuit was a detailed enumeration of the losses it continued to suffer while bound to the classical music format.

70/ See fn. 20 , supra, and press speculations about the financial benefit to Starr if the format were to be transferred to another station, e.g., A339. These facts would also appear to bring Starr's action within another line of cases where the Commission has expressed concern about disclosure where the licensee's personal interests or those of its employees, are non-broadcast ones which are not readily apparent to the viewer or listener. Cf., NBC, 14 FCC.2d 713 (1968) (Chet Huntley commentaries on meat inspection); Gross Telecasting, 14 FCC.2d 239 (1968) (nondisclosure in editorials of licensee interest in airport restaurants).

71/ While the cases cited do not turn on the precise technical construction adopted by the Commission in this case, neither do they lend support to the distinction made here by the Commission. And it is well settled law that a regulatory agency may not depart from prior law without a full explanation, e.g., Secretary of Agriculture v. U.S., 345 U.S. 653 (1954), an explanation which was hardly offered here.

> that a licensee's private interest may color its judgment....

(A410)

on this latter issue, it refused to impose the stricter standard as to the ultimately determinative question of whether a controversial public issue is in fact involved.

This is the quintessential "distinction without a difference" which, in fact, finds no support in the Commission's prior decisions[72/] and which, if permitted to stand, would emasculate the Fairness Doctrine to the point of mockery.

The failure to apply its precedentially and constitutionally mandated "stricter standard" to the "reasonableness" of Starr's judgment requires reversal in this case.

72/ One case, decided at approximately the same time as this, contained a similar reversal of precedent. In re Complaint of Public Communication, Inc., 50 FCC.2d 395 (1974). Under Secretary of Agriculture, supra, and Greater Boston Television Corp. v. FCC, 444 F.2d 841, cert. den. 403 U.S. 923 (1971); this non-explanatory reversal is similarly defective. Cf., NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974).

POINT III

THE DECISION BELOW MUST BE REVERSED BECAUSE THE COMMISSION FAILED TO TAKE A "HARD LOOK" AT PETITIONER'S CONTENTIONS

The normal standard of judicial review in Fairness Doctrine cases is:

> whether the Commission's order is unreasonable or in contravention of statutory purpose.
>
> Neckritz v. FCC, supra, 446 F.2d at 502

A finding of no Fairness Doctrine violation will be reversed where the Commission's decision "is not supported by substantial evidence," Office of Communications of United Church of Christ, supra, 425 F.2d at 550, or where the Court concludes, based on its consideration of the record and prior precedent that

> the Commission erred in concluding that the [material] in question did not present a point of view favorable to one side of a controversial issue of public importance.
>
> Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971)

Under these traditional standards, tempered by this Court's own First Amendment expertise, it seems clear that the Commission's decision was erroneous, unreasonable, arbitrary, and unsupported by substantial evidence, requiring reversal.

There is, however, another standard of review available to Courts of Appeals in their supervisory power over regulatory agencies which we believe is applicable here.

This standard has been enunciated as follows:

> Its supervisory function calls on the court to intervene not merely in cases of procedural inadequacies or by passing of the mandate of the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" 73/ at the salient problems and has not genuinely engaged in reasoned decision making.
>
> Greater Boston Television Corp. v. FCC, supra, 444 F.2d at 851 (footnote omitted)

This case, in addition to the apparent unreasonableness of the decision, 74/ if not the decision-making, presents just that "combination of danger signals"which casts serious doubts on the validity of the decision below.

Foremost among these "signals" is an observation of what the Broadcast Bureau, affirmed by the Commission, did not consider..

One of the Guild's major contentions in its pleadings was that the material broadcast by Starr as part of its "Save WNCN" campaign was actually logged by the station as "editorials" 75/ -- thus demonstrating Starr's own knowledge that it was airing one side of a controversial issue. While this crucial fact

73/ The "hard look" requirement has been imposed against the Commission in other situations, such as waiver of its rules, see, e.g., WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

74/ See, e.g., pp. 37-39, supra.

75/ See, e.g., Affidavit of Robert J. Schack (A39) and Guild Reply of September 30, 1974 (A76).

clearly went directly to the "reasonableness" of Starr's refusal to air opposing viewpoints,[76] the Broadcast Bureau's decision makes no mention of it whatsoever.

In affirming the Bureau's decision, the Commission aimilarly refused to accord any weight to this fact, although its explanation as to why it did not is both confusing and internally contradictory.[77]

Similarly, the Broadcast Bureau totally ignored the fact that Starr failed to submit all relevant material concerning the information broadcast over its facilities by its employees.

In its Opposition to the Guild's Fairness Doctrine complaint (A60, et seq.), Starr attached transcriptions of nine announcements, stating unequivocally,

> The continuity used in the announcements [broadcast over the air by WNCN] is attached.
>
> Starr letter, p.2., fn. 1 (A61)

76/ It stretches credibility to believe that when Starr's Board Chairman began taping messages to be aired over its facilities concerning one proposal for continuing the format, and logged these tapes as "editorials," Starr did not intend and/or understand those messages to represent a corporate position by Starr on the subject of how the public should deal with the proposed change.

77/ Citing its own rules, the Commission defines editorials as "programs presented for the purpose of stating the opinion of the licensee" and chastises the Guild for "incorrectly assum[ing] that any presentation labeled an "editorial" is, ipso facto, a presentation on a controversial issue of public importance" (Comm. op. at 7 (A411)). This not only misses the point of the Guild's argument as to "reasonableness," it directly contradicts Starr's position, adopted by the Commission, that the material in question did not "stat[e] the opinion of the licensee," but "simply took note of WNCN's format change" Com. Op. p. 8 (A411) (emphasis added).

The transcriptions supplied by Starr were, however, only the tip of the iceberg; the Guild submitted transcriptions of some eighteen separate announcements it recorded during the period September 8-September 13 -- clearly there were many, many others which were heard by listeners prior to that date.

The Bureau mentioned none of the Guild's transcriptions in its opinion, nor did it deal with the crucial question of the material conflicts and discrepancies between the tapes submitted by the Guild and Starr -- a question which obviously went directly to the issue of Starr's good faith.[78/]

Again, in an effort to justify this serious error by the Broadcast Bureau, the Commission glossed over the issue by the irrelevant observation that

> There is nothing in the Communications Act or in the Commission's Rules which requires that licensees maintain tapes or transcripts of their programming.
>
> Com. Op. p. 8 (A412)

78/ In its September 30 Reply, the Guild noted that Starr's omissions were serious, as to the validity of the Fairness Complaint itself, because many of the omitted announcements most directly presented WNCN's plan as a viewpoint on the overall format change issue. But it also noted that this raised equally significant lack of candor issues that went to the basic question of the licensee's exercise of "good faith discretion." In other circumstances, the Commission has held that a licensee's deliberate suppression of material information and/or supplying a false editorial in response to a personal attack complaint may cost him his license. Milton Broadcasting, 34 FCC.2d 1036 (1972) aff'd D.C. Cir. No. 72-1583 (Jan. 30, 1973).

and that, in any event, the Broadcast Bureau stated that it had considered all the transcripts.[79]

The alleged bad faith and/or lack of candor of the licensee in implying to the Commission that the material contained in nine tapes represented everything broadcast in connection with the "Save WNCN" campaign was never considered -- nor was the ancillary but similarly crucial question of whether, assuming no bad faith, the licensee's determination that he had not presented one side of a controversial issue could possibly have been "reasonable" if he did not know the majority of what he in fact presented.[80] Both of these Commission "explanations" of Broadcast Bureau omissions are directly related to the procedure employed here, complained of by the Guild, and unmodified by the Commission.

79/ Possibly the most startling fact of all is that in appending the "tapes" to its opinion, the Commission itself omitted most of the material submitted by the Guild, including only three of the announcements submitted by the Guild alone (A417), and omitting three announcements submitted by Starr.

80/ Both the Commission and the Broadcast Bureau seem to have entirely missed the point that whether information broadcast over Starr's station was taped continuity or repetitive and managerially encouraged "ad libs" by announcers, it was heard by the listeners and must be considered in determining whether they were thus deprived of their right to know all the facts underlying the controversy.

In a letter of December 19, 1974, the Guild questioned whether the very persons who wrote the unfavorable Broadcast Bureau decision were preparing the Commission's determination on appeal, and requested that the appeal be assigned to other, non-interested persons on the Commission staff (A224-26).

The failure to grant this request -- leaving yesterday's judges as tomorrow's advocates -- provides one explanation for the curious treatment of the claimed omission, and provides yet another "danger signal" that the requisite "hard look" did not occur.[81/]

In exercise of its supervisory power, and because the Commission clearly failed to engage in a "reasoned" decision-making process, the determination below must be set aside.

81/ We note also that the Guild's claim that the format issue itself required Starr's compliance with the "affirmative obligation" requirement of the Fairness Doctrine (A86) was entirely ignored by the staff. See pp. 16-17, supra.

POINT IV

BOTH THE FAIRNESS DOCTRINE'S AFFIRMATIVE OBLIGATION AND THE SPECIAL FIRST AMENDMENT CONSIDERATIONS IN THIS CASE REQUIRED STARR TO PRESENT ALL SIDES OF THE FORMAT CONTROVERSY

A. The Affirmative Obligation of the Fairness Doctrine

Totally aside from the question of whether Starr presented one side of a controversial issue, Point I, supra, is the fact that under the Fairness Doctrine, as developed by both Commission and courts, its failure to provide full coverage[82/] of the change of format[83/] violated its affirmative obligation to cover issues of controversy affecting its listeners. Red Lion, supra at 377, 1974 Report, supra at ¶ 24, 1949 Report, supra at 1249[84/]

82/ This affirmative obligation is also included in the requirement that all the underlying facts of a controversy must be presented, see p. 24, supra, which clearly was not the case here.

83/ Of course we do not concede that its extensive coverage of the "Save WNCN" campaign was not precisely a portion of the format change controversy, see Points I and II, supra; we here merely wish to demonstrate the consequences of Starr's position that it never covered the change of format issue at all.

84/ For a full discussion of the affirmative requirement of covering controversial issues see Comment, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 Harv. Civ. Rts.-Civ. Libs L.Rev. 137 (1975).

As the Supreme Court wrote, a licensee

> is prohibited from "excluding partisan voices and always itself presenting views in a bland inoffensive manner." ... A broadcaster neglects that obligation only at the risk of losing his license.
>
> CBS v. DNC, supra at 131

Under the facts of the instant case, particularly where the very issue of public importance primarily affected the listeners of its own station,[85/] this affirmative obligation was actually triggered twice.

This was first the case when the format change itself was announced and the question of whether Starr should re-air the classical music format became an issue of public controversy.

85/ Any radio audience is, in some senses, a "captive" one, CBS v. DNC, supra at 127. But it is also often a "captive" of the particular station whose audience it is. As one commentator has sensibly pointed out,

> The average person does not listen to a number of radio stations. He finds one station particularly enjoyable, either because of its programming format or ideology, and habitually listens to it.

He goes on to caution against reliance on a multiplicity of voices to present all sides of questions of the day, since the one station listener may then hear

> only one side of a vital issue, a result that undermines the goal of the First Amendment.

Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U.Cin. L. Rev. 447, 491-92 (1968). See Rutgers-Camden L.Rev., supra at 172.

Second, and equally important, after Starr devised its own, in-house plan to save WNCN, and that plan itself became the subject of controversy, Starr was obligated to cover that closely related but "separate" controversial issue.

Its failure to affirmatively cover all the "partisan" sides of these two hot issues violated the first and most basic tenet of the Fairness Doctrine.

B. Special First Amendment Considerations

As the courts have consistently stated, the regulation of broadcasting requires the balancing of various First Amendment interests, but because of the scarcity of broadcast facilities available, and the power of those to whom they have been given, in any controversy between broadcasters and listeners, the First Amendment rights of the latter must prevail. See, e.g., Red Lion, supra at 396-400, Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476,-77 (2d Cir. 1971).

This is particularly true in the case of Fairness Doctrine violations, whether of the affirmative obligation just discussed, or the requirement of covering both sides of a controversial issue, see Points I and II, supra. The Fairness Doctrine goes directly to the right of the people to be informed of the vital issues of their day, so that there will be vigorous debate and they may constitute an informed citizenry.

See, e.g., Red Lion, supra; Banzhaf v. FCC, supra, 405 F.2d at 1102.[86/]

In the instant case, however, the public had not only that "right to know" conferred upon them by the Constitution, the courts, and the Commission's own pronouncements,[87/] it had an additional and equally important First Amendment Right

86/ As the Court there wrote, in upholding the Commission's findings that cigarette advertising triggered the Fairness Doctrine,

> Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance. That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal. Id.

87/ Its own 1949 Report said this perhaps most movingly. The Commission wrote:

> It must be recognized ... that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues, does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend.
>
> The basis for any fair consideration of public issues and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and

(footnote continued on next page)

-- that of effectively petitioning the government, through the FCC, for the redress of grievances. The behavior complained of by the listeners[88/] in this case interfered equally with both these essential rights.

In a situation like this, where the licensee's interest and possibly his intent is that the public should not know the remedies open to them, or their right to pursue such remedies, the balance shifts entirely to the side of the listeners. Commission intervention, by means of application of the Fairness Doctrine or in its general public interest powers, cannot be seen as violative of the First Amendment, but rather is mandated by it.

(footnote continued)

> impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.

13 FCC at 1254-55.

88/ It must be remembered that petitioners here are a citizens group of the sort referred to most favorably by the D.C. Circuit as a "Public Intervenors" representing the public interest to the exclusion of personal or financial gain. Office of Communications of United Church of Christ, supra, 425 F.2d at 546.

There may be other situations in which this is the case, but where a licensee decides to get rid of a unique format whose retention may itself be a part of the "public interest," Citizens Committee to Save WEFM, supra, the public has a clear and direct right to know that it has the power to seek retention of the format; the licensee may not obscure or conceal this vital fact consistent with the basic principles of the Fairness Doctrine and the First Amendment.

In the leading format case, the D.C. Circuit, sitting en banc, strongly "suggested" to the Commission that it consider the First Amendment right of citizens to hear all sides of a format controversy over the station on which the format was heard. Citizens Committee to Save WEFM, supra at 258, fn. 14.

This case presented that opportunity for the Commission to act as the WEFM Court urged, and in accordance with the First Amendment mandate given it by the Supreme Court in Red Lion and CBS v. DNC, supra.

Its de facto refusal should not be ignored, and this Court, as an appropriate arbiter of First Amendment rights, need not

> ... defer ... to the Commission on a constitutional question ... [nor] hesitate to invoke the constitution should [it] determine that the Commission has not fulfilled its task with an appropriate sensitivity to the interests in free expression.
>
> CBS v. DNC, supra at 103

This Court should "invoke the Constitution" in setting aside the decision below, with a clear direction to the Commission that here and in the future the First Amendment rights of the people must be enforced.

CONCLUSION

For all the above reasons, the decision of the Commission should be reversed.

Dated: New York, New York
December 13, 1975

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4145

WNCN LISTENER'S GUILD

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA

Respondents

STARR WQ1V, INC

Intervenor

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 15th day of December, 1975, deponent served the within Breif and Appendix for Petitioner's upon C.Gray,Jr.,Geberal Counsel, Federal Communication Commission,Washington, D.C. 20554

Howard Shapiro, U.S. Dept. of Justice, Washington, D.C. 20530

Benito Gaguine, 1211 Connecticut Ave,N.W.,Washington, D.C. 20036

Attorney(s) for the Respondents in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 15th day of December, 1975 197__

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976